The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Deborah B. Goldberg
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

DECISION

VANNAK KANN D/B/A THE CROWN
74 MIDDLESEX STREET
LOWELL, MA 01852
LICENSE#: 063000293
HEARD: 04/20/2016

This is an appeal of the action of the City of Lowell License Commission (the "Local Board" or "Lowell") for suspending the M.G.L. c. 138, §12 all-alcohol license of Vannak Kann d/b/a The Crown ("Licensee" or "The Crown") located at 74 Middlesex Street, Lowell, Massachusetts. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and a hearing was held on Wednesday, April 20, 2016.

The following documents are in evidence:

1. Local Board Decision, 1/7/16;
2. Report of Sergeant Prescott, 10/25/15 at 2:32;
3. Report of Sergeant Prescott, 10/25/15 at 2:34;
4. Report of Officer Desmaris, 10/25/15 at 1:13; and
5. Report of Officer Desmaris, 10/25/15 at 4:18.

There is one (1) audio recording of this hearing, and three (3) witnesses, all of whom are police officers with the Lowell Police Department, testified.

At the conclusion of the April 20, 2016 hearing, the Commission left the hearing open so that the parties could submit written closing arguments. By agreement, the parties were given until June 28, 2016 to submit written closing arguments. The Commission received the Licensee's written closing arguments on or about June 28, 2016. The record is now closed.

The Commission took Administrative Notice of the Licensee's Commission File.

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FACTS

1. Vannak Kann d/b/a The Crown ("Licensee" or "The Crown") located at 74 Middlesex Street, Lowell, Massachusetts holds an all alcoholic beverages restaurant license under M.G.L. c. 138, §12. (Commission Records)

2. On October 25, 2015 at about 1:00 a.m., a woman ("Patron A") was passed out on the sidewalk directly in front of The Crown.

3. There were several people hovering over Patron A, including Patron A's mother (the "Mother") and security staff of the Licensee.

4. Sergeant Michael Prescott of the Lowell Police Department arrived at the scene and spoke with several people who said that Patron A had been celebrating a birthday at The Crown.

5. Sergeant Prescott tried to get Patron A to sit up, but she could not.

6. Patron A made repetitive statements and had slurred speech and watery eyes.

7. Officer Daniel Desmaris of the Lowell Police Department arrived at the scene and assisted Sergeant Prescott. Patron A was laying on her side when he arrived. Patron A was breathing but was unresponsive to Officer Desmaris's questions of her.

8. The police officers called an ambulance for Patron A, and she was transported to a local hospital.

DISCUSSION

Pursuant to M.G.L. Ch. 138, §67, "[t]he ABCC is required to offer a de novo hearing, that is to hear evidence and find the facts afresh. As a general rule the concept of a hearing de novo precludes giving evidentiary weight to the findings of the tribunal from whose decision an appeal was claimed." Dolphino Corp. v. Alcoholic Beverages Control Comm'n, 29 Mass. App. Ct. 954, 955 (1990) (citing United Food Corp v. Alcoholic Beverages Control Comm'n, 375 Mass. 240 (1978); Devine v. Zoning Bd. of Appeal of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Bd. of Appeals of Brookline, 362 Mass. 290, 295 (1972)). The findings of a local licensing board are "viewed as hearsay evidence, [and] they are second-level, or totem pole hearsay, analogous to the non-eyewitness police reports in Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 473 – 476 (1989)." Id.

Both the Local Board and the Commission have the authority to grant, revoke, and suspend licenses. Their powers were authorized "to serve the public need and . . . to protect the common good." M.G.L. Ch. 138, §23. "[T]he purpose of discipline is not retribution but the protection of the public." Arthurs v. Bd. of Registration in Medicine, 383 Mass. 299, 317 (1981). The Commission is given "comprehensive powers of supervision over licensees," Connolly v. Alcoholic Beverages Control Comm'n, 334 Mass. 613, 617 (1956), as well as broad authority to issue regulations. The Local Board has authority to enforce Commission regulations. New Palm Gardens, Inc. v. Alcoholic Beverages Control Comm'n, 11 Mass. App. Ct. 785, 788 (1981).

These "comprehensive powers" are balanced by the requirement that the Local Board and the Commission provide notice to the licensee of any violations, as well as an opportunity to be heard. M.G.L. c. 138, §64. In addition, the Local Board has the burden of producing satisfactory proof that the licensee violated or permitted a violation of any condition thereof, or any law of the Commonwealth. M.G.L. c. 138, §§23, 64.

The Commission's decision must be based on substantial evidence. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 528 (1988). "Substantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion." Id. Evidence from which a rational mind might draw the desired inference is not enough. See Blue Cross and Blue Shield of Mass. Inc., v. Comm'r of Ins., 420 Mass. 707 (1995). Disbelief of any particular evidence does not constitute substantial evidence to the contrary. New Boston Garden Corp. v. Bd. of Assessor of Boston, 383 Mass. 456, 467 (1981).

The Licensee is charged with service to an intoxicated person in violation of M.G.L. c. 138, §69. "No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person." M.G.L. c. 138, §69. "[A] tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have known that the patron is intoxicated." Vickowski v. Polish Am. Citizens Club of Deerfield, Inc., 422 Mass. 606, 609 (1996) (quoting Cimino v. Milford Keg, Inc., 385 Mass. 323, 327 (1982)). "The negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication." Id. at 610; see McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 161 (1986).

In order to prove this violation, the Local Board must prove: (1) that an individual was intoxicated on the licensed premises; (2) that an employee of the licensed premises knew or reasonably should have known that the individual was intoxicated; and (3) that after the employee knew or reasonably should have known the individual was intoxicated, the employee sold or delivered an alcoholic beverage to the intoxicated individual. See Vickowski, 422 Mass. at 609. "The imposition of liability on a commercial establishment for the service of alcohol to an intoxicated person ..., often has turned, in large part, on evidence of obvious intoxication at the time a patron was served." Id. at 610; see Cimino, 385 Mass. at 325, 328 (patron was "totally drunk"; "loud and vulgar"); Gottlin v. Graves, 40 Mass. App. Ct. 155, 158 (1996) (acquaintance testified patron who had accident displayed obvious intoxication one hour and twenty minutes before leaving bar); Hopping v. Whirlaway, Inc., 37 Mass. App. Ct. 121 (1994) (sufficient evidence for jury where acquaintance described patron who later had accident as appearing to feel "pretty good"). Contrast Makynen v. Mustakangas, 39 Mass. App. Ct. 309, 314 (1995) (commercial establishment could not be liable when there was no evidence of obvious intoxication while patron was at bar); Kirby v. Le Disco, Inc., 34 Mass. App. Ct. 630, 632 (1993) (affirming summary judgment for defendant in absence of any evidence of obvious intoxication); Wiska v. St. Stanislaus Social Club, Inc., 7 Mass. App. Ct. 813, 816-817 (1979) (directed verdict in favor of commercial establishment affirmed when there was no evidence that patron was served alcohol after he began exhibiting obvious signs of intoxication).

The Local Board must produce some evidence that "the patron in question was exhibiting outward signs of intoxication by the time he was served his last alcoholic drink." Rivera v. Club Caravan, Inc., 77 Mass. App. Ct. 17, 20 (2010). The Local Board may prove that an individual is intoxicated by direct or circumstantial evidence or a combination of the two. See Vickowski , 422 Mass. at

611 (direct evidence of obvious intoxication not required). "[S]ervice [to a patron] of a large number of strong alcoholic drinks [would be] sufficient to put [a licensee] on notice that it was serving a [patron] who could potentially endanger others." Cimino, 385 Mass. at 328. It is proper to infer from evidence of a patron's excessive consumption of alcohol, "on the basis of common sense and experience, that [a] patron would have displayed obvious outward signs of intoxication while continuing to receive service from the licensee." Vickowski, 422 Mass. at 611; see P.J. Liacos, Massachusetts Evidence § 4.2, at 118-119; § 5.8.6, at 242-244 (6th ed. 1994 & Supp. 1994).

In this matter, the Local Board produced no percipient witnesses or direct evidence regarding the Patron's conduct or demeanor at the time she was served her last alcoholic beverage or to the amount of alcohol that she consumed. The only witnesses who testified before the Commission were police officers. None of the police officers were present inside The Crown, and therefore, none of them could testify as to Patron A's condition at the time she was served her last alcoholic beverage or to the type and amount of alcoholic beverages that she consumed.

The alleged violation that is the subject of this appeal presents the Commission with issues regarding the admissibility of hearsay evidence and the weight accorded hearsay during an appeal from a local board's enforcement action. A decision of a board that rests entirely upon hearsay evidence cannot be sustained, but decisions based upon hearsay evidence that are supported and corroborated by competent legal evidence have been sustained. Moran v. School Committee of Littleton, 317 Mass. 591, 596-597 (1945) (citations omitted).

The Commission only heard testimony from Lowell police officers who had no direct knowledge of any of the elements necessary to support a violation of M.G.L. c. 138, §69, specifically Patron A's behavior and outward signs of intoxication at the time she was served alcoholic beverages. The police officers only observed Patron A's behavior after she consumed the alcoholic beverages, which does not support a finding of a violation of §69. The only information about what transpired inside the premises came from the police officers' recount of verbal statements made to them by Patron A's mother and friend. The manner in which the statements were introduced during the hearing before the Commission constitutes hearsay. These hearsay statements conveyed to the police officers the following information:

1. The Mother informed Officer Desmaris that their family was at The Crown celebrating a birthday. The Mother reported that over the course of about two to three hours, Patron A had about six to eight shots of alcohol, two of which were consumed at The Crown. The Mother also reported that Patron A was on several prescribed medications, including Lithium, and that the doctors had increased the dosage the day before.

2. A friend of Patron A informed Officer Desmaris that about five to ten minutes before Patron A passed out outside, Patron A had passed out inside the licensed premises and then was carried outside where she passed out again.

All of the information regarding Patron A's behavior and consumption of alcoholic beverages while inside of the licensed premises constitutes hearsay.[1] A decision of a board that rests entirely upon hearsay evidence cannot be sustained. See Moran, 317 Mass. at 596-597; Braintree Brew House LLC d/b/a The Brew House (ABCC Decision March 27, 2013) (violation of §69 disapproved where all of the evidence presented to the Commission constituted hearsay; all of the witnesses who testified had either arrived at the scene after the patron was outside the premises or were with the patron at the hospital). Therefore, pursuant to the controlling law as determined by binding court decisions, the Commission is persuaded and finds that the Local Board has not proved by legally competent evidence that Patron A manifested objective, observable signs of intoxication while inside the licensed premises and, after manifesting such signs of intoxication, was sold or delivered alcoholic beverages.

The Local Board has the burden of proving that the Licensee was on notice that Patron A was showing discernible signs of intoxication at the time she was served the last alcoholic beverage. In the present case, no evidence was offered to prove Patron A's intoxication at the time of purchase other than pure conjecture or surmise. Given these circumstances and the evidence presented, this Commission finds that we cannot draw an inference of obvious intoxication at the time of sale with the requisite degree of certainty.

CONCLUSION

The Commission **DISAPPROVES** the action of the Local Board in finding a violation of M.G.L. c. 138, §69, and for suspending the M.G.L. c. 138, §12 all-alcohol license of Vannak Kann d/b/a The Crown. As such, the Commission remands the matter to the City of Lowell License Commission with the recommendation that it find no violation and that no further action be taken against the Licensee, as any penalty would be discrepant with this Decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth A. Lashway, Commissioner Elizabeth A Lashway

Kathleen McNally, Commissioner Kathleen McNally

Dated: August 9, 2016

[1] The Local Board cannot sustain an inference of obvious intoxication based on excessive consumption where the only information about the number of alcoholic beverages consumed by Patron A was hearsay. Compare Cimino, 385 Mass. at 325 (inference of obvious intoxication could be drawn where evidence showed that patron had been served six or more White Russians); O'Hanley v. Ninety-Nine, Inc., 12 Mass. App. Ct. 64, 65 (1981) (inference of obvious intoxication could be drawn from evidence that patron consumed at least fifteen beers and six martinis); Rivera, 77 Mass. App. Ct. at 21 (where patron was served fourteen drinks over a two-hour period and drank "most" of them, it was for jury to decide whether he likely appeared intoxicated before he was served his last drink).

You have the right to appeal this decision to the Superior Courts under the provisions of Chapter 30A of the Massachusetts General Laws within thirty (30) days of receipt of this decision.

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cc: Raymond T. Weicker, Esq. via facsimile 978-244-1452
Kenneth J. Rossetti, Esq. via facsimile 978-453-1510
Frederick G. Mahony, Chief Investigator
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